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BRIEF FOR APPELLANT

Supreme Court of the United States

October Term, 1905.

No. 182

THE TERRITORY OF NEW MEXICO, *Appellant*,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

APPEAL FROM NEW MEXICO.

A. H. Harllee,
Frank W. Clancy,
Counsel for Appellant.

IN THE

Supreme Court of the United States

October Term, 1905.

THE TERRITORY OF NEW MEXICO, *Appellant*,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE RIO GRANDE, MEXICO AND PACIFIC RAILROAD COMPANY, AND THE SILVER CITY, DEMING AND PACIFIC RAILROAD COMPANY.

STATEMENT OF THE CASE.

Three actions were brought in the district court of Grant county, New Mexico, against the railroad companies above named, for the recovery of delinquent taxes amounting to $8646.49, levied in the years 1895, 1896 and 1897, for the payment of judgments against said county. These cases were consolidated and tried together as one case upon an agreed statement of facts before the court without an intervention of a jury, and judgment was entered against the defendants. The cases being taken to the supreme court of the territory that court affirmed the judgment of the district court

to the extent of $276.21 "for reasons stated in the opinion of the court on file."

In the courts below, the railroad companies made no contention against the validity of the judgments or of the debts upon which they were founded, but their contention was that there was no authority of law for the levy of any tax to pay those judgments except within the limits of the tax authorized for current county expenses, and that the levy for county purposes in each of the thre years in which the levies for the judgments were made being up to the limit authorized by statute, there was no room for the levy of any additional special tax for the judgments. This contention was overruled by the district court, but sustained by the supreme court, as will be seen by reference to the opinion of that court, which appears on pages 129 to 134 of the printed record, and which by reference to it in the judgment of the court, on page 127 of the record, seems to be a part of the judgment itself.

The position of the plaintiff as to this defense will be hereinafter definitely stated.

Appellant has made and filed the following:

ASSIGNMENT OF ERRORS.

SUPREME COURT OF THE UNITED STATES.

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Now comes the appellant and says to the court that

there is manifest error in the record, proceedings and judgment of the supreme court of the Territory of New Mexico, and specifies the following as such errors:

1. The said supreme court erred in failing and refusing to affirm the judgment of the district court in its entirety.

2. The said supreme court erred in holding that there was no authority of law for the levy of a tax for the payment of judgments in excess of three mills per annum authorized by statute for county current expenses and for deficit.

3. The said supreme court erred in holding that any levy for county purposes beyond three mills per annum would be without authority of law.

4. The said supreme court erred in holding, in effect, that the county commissioners had no authority of law to create the indebtedness on which the judgments were rendered.

5. The said supreme court erred in holding, in effect that the levies made for the payment of the judgments were in excess of the power and authority of the county commissioners.

Wherefore appellant prays that the judgment of the supreme court of the Territory of New Mexico be reversed and set aside and this cause remanded to the said supreme court, with directions to affirm the judgment of the district court of Grant county.

A. H. HARLLEE,
FRANK W. CLANCY,
Counsel for Appellant.

Appellant will undertake to establish the following

propositions as controlling and decisive of this case:

First, there is direct statutory authority to levy taxes to pay judgments against counties.

Second, there is no limitation as to rate of tax which may be levied for payment of judgments against counties.

Third, if there is any limit as to levy to pay judgments, the record does not show that it has been reached.

Fourth, no statutory limit as to rate of taxation is applicable to payment of compulsory obligations imposed by the legislature.

POINTS AND AUTHORITIES.

FIRST.

There is direct statutory authority to levy taxes to pay judgments against counties.

The statute of New Mexico on this subject, originally enacted as section 7 of Chap. 1 of the Laws of 1876, by which county commissioners were first brought into existence in New Mexico and now appearing unchanged in the latest Compiled Laws of 1897 as section 657, is as follows:

> Sec. 7. When a judgment shall be rendered against any board of county commissioners of any county, or against any county officer in an action prosecuted by or against him in his official name where the same shall be paid by the county, no execution shall issue upon said judgment, but the same shall be levied and paid by tax as other county charges, and when so collected shall be paid by the county treasurer to the person to whom the

same shall be adjudged, upon the delivery of a proper voucher therefor.

The existence of this statutory authority is not disputed, as we understand, by defendants, but it is contended that when read in connection with other statutory provisions, its effect is greatly limited and narrowed. This will be clearly shown in the discussion of the second and third points of this brief, where we expect to demonstrate, first, that there is no limit upon this power, and, second, if we assume that there is, that it has not been exceeded.

SECOND.

There is no limitation as to rate of tax which may be levied for payment of judgments against counties.

It is obvious from the language of the statutory provision hereinbefore quoted that this position must be correct unless that provision is modified by some other. The opinion of the supreme court of New Mexico asserts that there are such other provisions of law as operate to restrict within very narrow limits the general power to levy taxes for the payment of judgments—indeed, within such limits as to make the power practically of no value,—and we will proceed to examine those other provisions of law, which, it is asserted, have this effect. The first of these is to be found in the tenth subdivision of section 13 of Chap. 1 of the Laws of 1876, which re-appears in the Compiled Laws of 1897 as section 664. This section consists of an enumeration in a number of paragraphs of the powers of the

board of county commissioners. That tenth subdivision reads as follows:

> Tenth, They shall also constitute boards of equalization of taxes and to hear appeals from the action of the assessors who make the assessments; they shall revise the lists of assessment within their respective counties, and shall correct the same, and shall hear and determine all appeals of assessments that may be brought before them, as required by law, and in no event shall the said commissioners levy any assessment of taxes exceeding one per cent.

The supreme court also quotes so much of section 1 of Chap. 2 of the Session Laws of 1874 as provides that property

> shall be subject to an *ad valorem* tax of one per centum upon each dollar of the value thereof, which shall be assessed and collected as is now, or as may be hereafter provided by law for the assessment and collection of taxes, one-half thereof to be applied solely and exclusively for territorial purposes, one-fourth in like manner for county purposes, and the remaining one-fourth to be applied to school purposes.

The court also appears to rely upon section 6 of Chap. 62 of the Session Laws of 1882, which is as follows:

> Sec. 6. There shall be levied and assessed upon the taxable property within this territory in each year the following taxes:
>
> For Territorial revenue, one-half of one per cent.
>
> For ordinary county revenue, one-fourth of one per cent.
>
> For maintenance and support of public schools, one-fourth of one per cent.

Based upon these statutory provisions the learned

court builds up the argument that the limitation of power to levy taxes contained in the tenth subdivision of the section defining the authority of county commissioners, must be held to cover all taxes for all purposes, territorial, county, schools and payment of judgments. The position of plaintiff is that these provisions of law do not necessarily relate to each other, and that the general power to levy and collect taxes for the payment of judgments in the same manner as taxes for other county charges, is a general unlimited power of taxation outside of and beyond any limitation to one per cent. or to one-fourth of one per cent. for county purposes, which the learned supreme court assumes to have been created by the statutes quoted. If there can be any doubt as to the correctness of this position, still, so far as this case is concerned, as will be shown under the third point hereof, the record in this case does not show that the county commissioners have exceeded any limitation which can be plausibly maintained as actually existent.

Any contention which may possibly be made that the language of the statute as to the payment of judgments "by a tax as other county charges" imports into this section any restriction or limitation to the amount of tax authorized for county purposes, which was one-fourth of one per cent., is obviously untenable. The language of the statute undoubtedly refers merely to the manner of collection or machinery to be put in force for the collection, by a levy at the same time and upon a like valuation as for other county charges under the same supervision of county commissioners. In the absence of this provision, such a tax might be levied

at irregular times, thus imposing unusual and unnecessary expense.

We submit that a leading case in this court is conclusive of the position for which we contend. In that case a mandamus was issued to the city of Muscatine to compel the levy of a tax to pay a judgment which had been recovered against the city, and the city made return to the writ that under the laws of Iowa it was not permitted to levy a tax exceeding one per cent. upon the taxable property of the city for all purposes in any one year. By an act of the legislature of Iowa, amending the charter of the city of Muscatine, adopted in 1852, authority was given to the city council to levy a tax of not exceeding one per cent. upon the assessment in any one year. By section 3275 of the Code of 1860, provision was made in case of judgments for the levy of a tax "as early as practicable sufficient to pay off the judgment with interest and costs. These two provisions of law were no more inconsistent with each other than the various statutory provisions quoted and relied upon by the supreme court of New Mexico, and, by the same method of reasoning adopted by that court, would have led to the conclusion that the power to levy a tax for the payment of a judgment against the city of Muscatine must be restricted to the one per cent. limit contained in the act of 1852. Moreover, it might have been urged as an added ground in favor of this position, that the earlier statute was a special law with regard to that city, and should not be considered as disturbed by the general provisions of the Code of 1860. We quote from the opinion of the court the

following language, nearly all of which appears to be directly applicable to the present case.

> These regulations were contained in the Code of 1851, and have been in force ever since. They were re-enacted in the Code of 1860, and have a controlling effect upon the determination of this case. The limitation in the Act of 1852, touching the exercise of the power of taxation by the city council, applies to the ordinary course of their municipal action. Whenever that action is voluntary, and there is no debt evidenced by a judgment against the city, to be provided for, one per cent. is the maximum of the tax they are authorized to impose. But when a judgment has been recovered, the case is within the regulations of the Code. Those provisions are then brought into activity, and operate with full force, until the judgment, interest and costs are satisfied. The limitation in the Act of 1852 has no application in such cases, and imposes no check, if larger taxation be necessary. The contingency is one not contemplated, and not provided for by the Act of 1852. If the legislature had intended to qualify the requirement prescribed by the Code, it is to be presumed it would have done so, in language as clear as that which it has employed to express the duty to be performed. It leaves no room for doubt or construction. Nothing can be more simple and direct than the terms in which the levy of a sufficient tax is enjoined. The extent of the necessity is the only limitation, express or implied, in the Code of the amount to be levied. We cannot interpolate a restriction by importing it from another Act which has no necessary relation to the class of cases for which the code intended to provide. When the judgment is recovered the duty arises, and it can be satisfied only by paying the debt, interest and costs, in the manner prescribed. The source whence the means are to be drawn is described, and full power is given to collect them.

There is no difficulty as to authority to levy a tax of the requisite amount, whatever it may be. Section 3276 of the Code declares that a failure on the part of the officers of the corporation to perform the duty enjoined, shall render them 'personally responsible for the debt.'

In the construction of a statute, what is clearly implied is as effectual as what is expressed. U. S. v. Babbit, 1 Black 61-66 U. S., XVII., 96.

The minutest details could not have made the meaning and effect of these provisions clearer than they are. The limitation in the Act of 1852 is confined to the city of Muscatine. The regulations of the Code are general in their terms, and apply to all the municipal corporations mentioned in section 3274.

If these views be not correct, the position of the judgment creditor is a singular one. All the corporate property of the debtor is exempt by law from execution. The tax of one per cent. is all absorbed by the current expenses of the debtor. There is neither a surplus nor the prospect of a surplus which can be applied upon the judgment. The resources of the debtor may be ample, but there is no means of coercion. The creditor is wholly dependent for payment upon the bounty and the option of the debtor. Until the debtor chooses to pay, the creditor can get nothing. The usual relations of debtor and creditor are reversed, and the judgment, though solemnly rendered, is as barren of results as if it had no existence. Such are the effects which must necessarily follow from the theory, if maintained, of the defendants in error. Nothing less than the most cogent considerations could bring us to the conclusion that it was the intention of the law-making power of so enlightened a State to produce, by its action, such a condition of things in its jurisprudence.

U. S. ex rel v. Muscatine, 8 *Wall.*, 580-1-2.

It has been contended that the Muscatine case just

quoted from was overruled by this court in another case coming up from the state of Iowa. While there may be some plausibility in this suggestion, yet a close examination will show that the change in the decision as made by this court in the later case, was in deference to an adjudication by the supreme court of the state as to the construction of the state statute, which was not in harmony with the views of this court, but which was held inapplicable in the Muscatine case because the state court adjudication was made some years after the creation of the indebtedness under consideration in the Muscatine case. This will be plain fro mthe following quotation:

> It is insisted, however, that in Butz v. Muscatine, 8 Wall., 575 75 U. S., XIX., 490, this court ruled that section 3275 of the Code did give power to the city councils of Muscatine to levy a special tax beyond the statutory limit of ordinary city taxation, sufficient to pay a judgment which had been recovered against the city. This is true. But the facts of that case must be considered. The judgment had been recovered upon bonds issued by the city in 1854. At the time they were issued no decision had been made by the supreme court of the state to the effect that section 3275 was not an enabling statute authorizing a tax beyond that allowed by other statutes. It was not until nine years afterwards that the supreme court of the state was called upon to determine its meaning. Hence this court felt at liberty to adopt its own construction and apply it to the case of the holder of the bonds, though it was adverse to that announced by the state court years after the bonds had been issued. But at the same time it was said, "if the construction given to the statute by the state court had preceded the issuing of the bonds, and become the settled law of the state before that

time, the case would have presented a different aspect."

In the case we have now in hand, it appears that the warrants upon which the relator recovered his judgment, not only were for the ordinary indebtedness of the county, but that they were issued after it had become the settled law of the state, announced in the decisions of its highest court, that the action of the statute relative to executions, now under consideration, did not enlarge the authority of a county board of supervisors, and did not authorize the levy of a tax beyond that provided for in section 710; that is, a tax in excess of the rate of four mills on the dollar. The holders of the warrants were, therefore, informed when they took them, that by the laws of the state no special tax could be levied for their payment, unless the question whether such a tax might be had should first be submitted to the people and by them answered in the affirmative, according to the directions of sections 250 and 252, to which reference has heretofore been made. In this particular the case differs from Butz v. Muscatine. Looking at the difference, we think there is no sufficient reason why we should now depart from the construction which the courts of the state have uniformly given to its statutes.

Supervisors v. U. S., 18 *Wall.*, 82-3.

It must be evident that this Supervisors' case can have no application to our present contention. Prior to the opinion of the supreme court of New Mexico in the present case, there had never been any adjudication in New Mexico that the power to levy a tax to pay a judgment was in any way restricted or limited, and, so far as our courts had spoken at all, the decisions were in the opposite direction.

Laughlin v. County, 3 *N. M.*, 426.

U. S. Trust Co. v. Territory, 10 *N. M.*, 431-2

We feel better satisfied to rely upon the doctrine enunciated by this court when it "felt at liberty to adopt its own construction," although that construction did not conform to that of the state court of Iowa, rather than the later case where this court felt constrained to abandon its own construction, under the circumstances of the case, and apply that of the state court.

The position of the learned supreme court of New Mexico appears to be that the limitation in the act of 1876, restricting the county commissioners to a levy of one per cent., is in harmony with the act of 1882 providing for taxes for territorial, county and school purposes, amounting to one per cent., and that these acts continuing in force, mean a limitation as to the aggregate amount of taxes which could be levied in 1895, 1896 and 1897. A brief consideration of tax legislation after 1882 will show that there is no good foundation for this position.

In 1889 by section 13 of Chap. 32 of the laws of that year, the legislature provided that there should be levied during the fortieth fiscal year, upon each dollar of taxable property, a tax of seven mills on the dollar. No change was made at this time as to the levying of taxes for county and school purposes. If the limitation of one per cent. in the act o 1876 is to be applied as the supreme court of New Mexico insists to all kinds of taxes, in 1895, then, evidently, when the legislature increased the territorial tax from five to seven mills, the county and school taxes would have to be diminshed after 1889.

Again, in 1897, by section 6 of chapter 95 of the

laws of that year, an annual tax of six and one-half mills was provided for territorial purposes, and by section 24 of chapter 25 of the laws of the same year, the territorial auditor was directed annually to levy a tax not exceeding thre mills on the dollar for school purposes, to be apportioned to the several counties. Here, we have legislation providing for taxes not for county purposes up to nine and one-half mills, and if the position and reasoning of the supreme court of New Mexico are sound, there was room left for the levy of only half a mill for ordinary county purposes.

In 1893, by section 20 of chapter 61 of the laws of that year, prior to which time all district court expenses were paid from the territorial treasury, the county commissioners were authorized without any statement of a limit, to levy "a tax upon each dollar of taxable property sufficient to meet the expenses of the district courts"; section 2 of chapter 54 of the laws of the same year, makes an appropriation of twenty-five hundred dollars "and the territorial auditor is authorized and instructed to levy a tax upon the taxable property of the territory during the year commencing March 4, 1894, for the purpose of providing funds for such an appropriation of $2,500;" and section 3 of chapter 61 of the laws of the same year, provides for the levy for territorial purposes of a tax of six mills on the dollar. And yet we are told that the one per per cent. limit of the act of 1876 still applies to all taxes which the county commissioners can order to be collected.

In 1895, by section 4 of chapter 3 of the laws of that year, the legislature levies a tax for territorial pur-

poses of six mills on the dollar, and by section 6 of the same act a tax of one and three-fourths mills for territorial institutions.

The thought which naturally comes to the mind, is that the limitation of one per cent. which county commissioners may levy, can have no relation to the taxes levied by the legislature, but must relate to taxes within within the discretion of the commissioners. This will be discussed under the third point of this brief.

In a well considered but much earlier case in the supreme court of New Mexico, entirely different views are announced from those entertained by that court in the present case. Referring to the revenue act of 1882, hereinbefore mentioned and quoted from, the court speaks as follows:

> When we consider how minute a catalogue of subjects is included in the revenue act in question, it is impossible to believe that the legislative mind intended, while expressly enumerating these, to leave to mere implication the inclusion of other matters of great and special moment, such as the extraordinary power in counties of creating a large debt by popular vote, and the power in the several counties to levy taxes for the payment of judgments. Laws of 1876, ch. 1, sec. 7. The general revenue act contains no express limitation upon the power of taxation. Nevertheless, the provisions of the sixth section, viz., "There shall be levied and assessed upon the taxable property within this territory in each year, the following taxes: For territorial revenue, one-half of one per cent; for ordinary county revenue, one-fourth of one per cent.; for maintenance and support of public schools, one-fourth of one per cent.," may well be construed to imply a restriction on the taxing power, so far as it relates to the subjects specified.

> In the absence of such a restriction, express or implied, the power to contract and to incur public indebtedness implies the power to raise by taxation the funds needed for the execution of the former power. Loan Association v. Topeka, 20 Wall., 655. But the provisions above cited have exclusive reference to taxation for the ordinary purposes of government, the usual disbursements during each fiscal year in the ordinary administration of public affairs. They have no reference whatever to the execution of extraordinary powers under special statutes, and which are wholly outside of the common course of administration. Nashville R'y Co. v. Franklin Co., 7 Am. & Eng. R. R. Cas. 260; McCormick v. Fitch, 14 Minn. 252.
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> Even an express limitation on the rate of taxation is not generally operative to prevent taxation for extraordinary purposes, as, for instance, that of satisfying judgments against a municipality. Butz v. Muscatine, 8 Wall.; McCracken v. San Francisco, 16 Cal. It could hardly be seriously contended that any of the provisions of the general revenue act operate to limit the special power previously granted to the several boards of county commissioners to levy taxes for the payment of judgments (Laws 1876, ch. 1, sec. 7), or tend to affect the funding acts of the same session.
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> Laughlin v. County, 3 N. M., 425-6.

The learned judge who wrote the opinion of the court below, appears to rely greatly upon the authority of *United States v. Macon County*, 99 U. S., 582, and, as he states in the opinion, in that case a defense was set up that there was no express statute authorizing the levy of a tax to pay a judgment, but this court held, in substance, that there was authority to levy a tax to pay the coupons upon which the judgment was founded,

and that the creditor did not lose any remedy which he had before judgment by changing the form of the debt. Based upon this adjudication, the learned justice reaches the conclusion that "if no authority existed to make a levy to pay such original claim, then it follows that there was no authority to make a levy to pay the judgment." This is a *non sequitur* of the most patent character, and begs the question which really is whether there is not statutory authority to levy a tax to pay any judgment which may be recovered against a county. The fallacy which underlies the whole opinion is that any indebtedness in excess of the product of the tax of one-fourth of one per cent. for county purposes in any year, is illegal and beyond the power of the county commissioners to create. There is not a word to be found in the legislation of New Mexico to justify this position prior to the year 1897, but it is obvious that any statute of that year has no application to the present case, and, without attempting to quote from the statute commonly called the "Bateman Act," it is sufficient to say that it had only a prospective operation and did not attempt to affect any past transactions.

Laws of 1897, Chap. 42, Sec. 15.

At the time of the enactment of the statute of 1876, in which, alone, is to be found the limitation on the power of the commissioners to levy a tax, it was a matter of such common knowledge in the Territory of New Mexico that the court would take judicial notice of the fact, that many, if not all, of the counties had incurred debts in the course of the management of ordinary county affairs, in excess of their ability to pay

from the collections of the ordinary taxes, and large quantities of county warrants had been regularly issued on account of such indebtedness and were outstanding and unpaid. There can be no doubt that the legislature had this state of things in view in legislating as it did in regard to the payment of a judgment by a tax, and this strengthens our contention that the authority to levy a tax to pay judgments was a special authority for an additional tax beyond and outside of the taxes levied by the legislature.

This state of affairs was recognized by the legislature both before and after 1876, as we will proceed to show, and there cannot be found in the legislation on this subject any suggestion that the debts were invalid.

The second section of chapter 32 of the Laws of 1870 reads as follows:

> Sec. 2. That whenever there shall be offered in payment to such sheriffs or collectors, any legal bond or bonds of the territory or of the county, for any license, fine or assessed tax, etc., they shall be received as current money of the United States, that has been issued on the credit of the territory or county to which such bonds pertain; it being understood that such sheriffs or collectors shall return a list of the names of the persons from whom they have collected any sum of money, and whether the same has been paid in bonds or current money of the United States, provided further, that the bonds of the county shall be received only for taxes pertaining to the county, and bonds of the territory only on taxes of the territory.

The above quotation is from the statutes as printed in English, but attention should be called to the fact, in explanation of the use of the words "bonds," that this statute, as was not uncommon at that time, was passed

originally in Spanish, the original version being the authorized one by New Mexican statute, and the words in Spanish clearly mean warrants of the counties and not bonds in the strict sense of the term. It is probable that, in 1870, there were no county bonds in existence in New Mexico. The statute which makes the Spanish version of this act the authoritative one, will be found in section 1 of chapter 1 of the laws of 1874, and reappears as section 3800 of the Compiled Laws of 1897, and reads as follows:

> Sec. 1. That hereafter in the construction of the statutes of this Territory, whether the same be of the "Compiled Laws," "Revised Statutes," or of the "Session Laws," the language in which the said law was originally passed, shall govern, whether it be in Spanish or English; and no part of said statutes which may be shown by said "Compiled Laws," "Revised Laws," or "Session Laws," to be only the translation of the law originally passed, whether in Spanish or English, shall be taken into consideration by any court of this territory, in making any ruling, or decision, based on any statute of this territory.

Section 11 of Chap. 22 of the Laws of 1872 is as follows:

> Sec. 11. That the collectors of revenue provided in virtue of this act shall receive territorial and county warrants in payment of territorial and county taxes: provided that the part of the assessment for school purposes shall be paid entirely and exclusively in legal money of the United States, and further provided, that the collectors and assessors shall receive as full compensation for their services in collecting and assessing the sum of five per centum of the sum so assessed and collected.

This statute shows the existence of outstanding

county warrants which could not be paid, but which the legislature required to be received at their face value for taxes.

Chapter 4 of the Laws of 1874, which is entitled "An Act with reference to county warrants," is as follows:

> Sec. 1. That hereafter, whenever in any county of this territory, there shall not be sufficient funds in the treasury of any county, to complete the erection of any court house, or jail, in said county, and it shall become necessary to issue the warrants of said county for the deficiency, or the whole thereof, the probate judge issuing the same may authorize said warrants to draw interest, at a rate not exceeding ten per cent. per annum, which shall be fixed by said probate judge, and included in said warrants, and all warrants heretofore issued in any county of this territory, for the purposes aforesaid, and drawing a rate of interest, are hereby approved and made valid.

Chapter 14 of the Laws of 1878 is entitled "An Act regulating the manner in which outstanding indebtedness of the several counties of the territory shall be paid and for other purposes." We quote two sections from that act:

> Sec. 2. All warrants hereafter drawn on the treasury of any county of the territory shall be presented to the treasurer for payment, and if there be no sufficient funds in the treasury to pay the same, the treasurer shall indorse thereon the words "not paid for the want of funds," with the date of the presentation, signing the name thereto, and he shall at the same time, register the same in a book to be kept for that purpose, and shall note thereon the number, date of issue, date of registry, in whose favor drawn, and the amount thereof, and all such warrants shall bear interest

from the date of their registration at the rate of three per cent. per annum.

Sec. 3. All warrants now outstanding, and all warrants hereafter drawn shall be paid in the legal tender currency of the United States, and shall be paid in the following order: First, the interest bearing warrants shall be paid in the order of the date of their registration; Second, the warrants not bearing interest now outstanding, shall be paid and in the order of the date of their issue; Third, the warrants hereafter issued shall be paid and in the order of their date of their registration; provided, all warrants now outstanding not bearing interest, shall bear interest at the rate of three per cent. per annum, after six months from their date; provided further, that all county warrants shall be received in payment of county licenses and county taxes.

Section 49 of chapter 62 of the Laws of 1882 is as follows:

Sec. 49. All taxes shall be paid in lawful money of the United States; provided, that the treasurer shall receive as cash, in payment of the territorial taxes auditor's warrants, and in payment of county taxes county warrants, duly issued.

Section 1 of chapter 65 of the laws of the same year 1882, and the first sentence of section 4 of the same act, are as follows:

Sec. 1. The county commissioners of the respective counties of this territory are hereby authorized to issue bonds of said counties in exchange for the outstanding warrants thereof, and the interest accrued and unpaid thereon.

Sec. 4. At any time after the passage of this act the holder of any warrants of any county, heretofore issued by the county commissioners, and at any time after the first day of July, 1882, the holder of any warrants of any county issued between

the passage of this act and the first day of July, 1882, amounting to one hundred dollars or more, may apply to the probate clerk of such county for bonds of the kind hereinbefore described in exchange for such warrants and the interest accrued thereon, and it shall thereupon become the duty of the county commissioners to issue bonds as aforesaid and deliver the same to the holder of such warrants.

Chapter 62 of the Laws of 1884 contains the following:

Sec. 1. When any warrant or order, regularly and lawfully drawn upon the treasurer of this territory, or the treasurer of any county in this territory, or the treasurer of any municipal government in this territory, is presented for payment and such treasurer has not the funds with which to meet such demand, such treasurer shall register such warrant or order in the manner hereinafter provided.

Sec. 2. Any warrant or order drawn upon any treasurer contemplated by the foregoing section of this act, if not paid when presented for the want of funds, shall be registered in the order of its presentation in a book to be kept for that purpose.

Sec. 4. The register contemplated by this act shall contain the number of the warrant or order, date of presentation, the amount for which and in whose favor drawn. Such register shall be open to the inspection of the public at all reasonable times during the business hours of the day.

Sec. 5. The treasurer shall set apart from the public funds, as fast as they accrue, the full amount of each warrant or order in the order in which they appear on such register, and payments shall be made in the order in which such warrants or orders are registered.

Chapter 46 of the Laws of 1887 contain the following:

Sec. 6. All persons holding any county warrants on the first day of May, A. D. 1887, may on or before the first day of July, A. D. 1887, report the same to the treasurer of the county, giving him the number and date of such warrant, the amount thereof, and the name of the person in whose favor the same was drawn, and it shall be the duty of the treasurer of each county to prepare and keep a well bound book, with proper headings and rulings, in which he shall make a record of each county warrant outstanding on the first day of May, A. D. 1887, in the order in which the same may have been issued, stating, in such record the number of the warrant, and date thereof, the name of the person in whose favor drawn, and the amount thereof, and such warrants shall be paid by the treasurer of the county, at his office, in the order of their issue, with six per cent. interest.

Chapter 15 of the laws of 1889 has the following section:

Sec. 1. That from and after the passage of this act it shall be unlawful for any county commissioner, sheriff, treasurer, assessor, probate judge, probate clerk or any other person who as principal or deputy, holds any county office in any county of this territory, to either, directly or indirectly, buy, sell, barter, deal in or speculate in or with any certificate, warrant or other evidence of indebtedness issued by such county or by the territory of New Mexico, except such certificate, warrant or other evidence of indebtedness shall have been lawfully issued to such person in payment of his salary or in compensation for services rendered by such person or for supplies furnished by him to such county or territory.

The first sentence of section 1 of Chap. 68 of the Laws of the same year, 1898, is as follows:

Sec. 1. The county commissioners of the respective counties of this territory are hereby au-

thorized and empowered to issue coupon bonds of the said counties in exchange for their outstanding indebtedness as evidenced by the warrants or bonds of said counties duly issued, which has now accrued or may accrue up to the first day of July A. D. 1889.

In the face of these repeated legislative recognitions of the existence of county indebtedness, for the payment or funding of which provision is made, there is no room for the contention that there was any legislative intent to restrict the power of counties to create valid indebtedness to the amount realized from the authorized taxes for county purposes. The legislature undoubtedly considered these debts authorized and valid. If they were valid, they would constitute the basis for judgments against the counties, and upon judgment being obtained the county would be compelled to levy a tax sufficient to pay the judgment, or the provision of law upon that subject is entirely meaningless.

THIRD.

If there is any limit as to levy to pay judgments, the record does not show that it has been reached.

We do not wish to be understood as conceding that there is any statutory limit upon the power to levy taxes for the payment of judgments, as we insist that there is no such limit. If it can be imagined, however, that the limitation expressed in the act of 1876, as to the power of the county commissioners to levy taxes, has any connection whatever with the authority to levy a tax to pay a judgment, it is easily demonstrable that that limitation cannot be so construed as to prevent

the county commissioner from levying for judgments a tax not included within the one-fourth of one per cent. specifically levied for county purposes by the legislature, but must refer to something as to which the county commissioners at that time had some power and discretion. We assert that the only such thing then in existence was the power to levy a tax for the payment of judgments, and if this limitation refers to that, the record in this case does not show that the limit has even been reached.

A review of New Mexican legislation on the subject of taxation, will disclose the fact that when the act of 1876 was passed, no local county officer had authority to levy any taxes. It is undoubtedly true that in New Mexico, as in many other jurisdictions, the words "levy" and "assess" in connection with matters of taxation, appear to be used indiscriminately and with but little regard to their original definite meanings, and it is not intended here to make any argument based upon narrow or technical meaning of words. What is intended, is to assert that no county authority had power between 1870 and 1876 to make any order levying a tax of any kind. Such an authority is to be implied from the act of 1876 creating county commissioners, although not there expressed in direct terms.

Four sections of chapter 18 of the Laws of 1870 will show the system which formerly prevailed in New Mexico, and those sections are as follows:

> Sec. 1. All real and personal property, not otherwise exempted by this act, shall be subject to an *ad valorem* tax of twenty cents upon each one hundred dollars value of the same, for territorial purposes, which shall be assessed and paid as here-

inafter provided, and all property situated, respectively, in each county, shall be subject to pay a county tax of five cents upon each one hundred dollars value of the same, which shall be assessed, levied and paid, as hereinafter provided, for county purposes.

Sec. 8. Every ppraiser is required to provide himself annually with two books, well bound, the cost of which shall be paid respectively by the treasurers of the territory and of the county, under the direction of the auditor of public accounts, and the probate judge, which shall be used by said appraisers as a register in which they shall enter alphabetically the names of all persons whose property has been appraised, showing whether the oath of such persons has been given for themselves or as attorney, agent, or custodian of the property of another person, the amount sworn to, and the amount of tax or impost thereon, together with such remarks opposite each name as may be necessary, and at the expiration of the time fixed for making such appraisements, it shall be the duty of the appraiser to make a general summary of his appraisements in said registers, and certifying to the same under oath.

Sec. 9. It shall be the duty of the appraisers within their respective counties, fifteen days before the first Monday of May in each year, to diligently seek out all and every one of the persons who through oversight, negligence, or willfully, has failed to make the proper returns of the valuation of their property, as required by this act, and if it appears that such person or persons have so failed, it shall be the duty of the appraisers to proceed to make a valuation of said property, as hereinbefore provided; it being understood that having closed or completed the valuation of their county, it shall be their duty to present their books to be examined and corrected by the probate judge and the board hereinbefore mentioned, with

> regard to the proper amounts of tax and immediately to send one of said books to the auditor of public accounts, and after having deposited the other with the public records of his office, he shall furnish the sheriff of his county together with an order of the said court under the seal thereof, directing him to collect from each person the sums placed opposite their names respectively, which decree or order from the probate court shall have the force of an execution in every case of levy of taxes.

From this statute, it will be seen that the legislature, in effect, made the levy of taxes, declaring what property should be subject to taxation and fixing the rate. The local authorities were intrusted with a making of the valuation or assessment of the property and an order to the sheriff, who was ex-officio collector of taxes, to collect the tax upon the persons and property thus assessed. No discretion as to the amount or rate of the tax was delegated by the legislature.

Section 6 of Chap. 22 of the Laws of 1872 is as follows:

> That hereafter all real and personal estate, excepting five hundred dollars from articles two to seven of the revenue law passed January seventeen, eighteen hundred and seventy, shall be subject to *ad valorem* tax of one cent or one per-centum upon each dollar of the value thereof which shall be assessed and collected as is now or as may hereafter be provided for the assessment and collection of taxes, one-half per centum to be applied solely and exclusively for territorial purposes and the remaining one-half per centum to be applied in like manner for county and school purposes in the county wherein the same is collected —that is to say, twenty-five cents for county purposes and twenty-five cents for schools: provided,

there shall be deducted the indebtedness of those owing taxes.

There was some legislation on the subject contained in Chapter 2 of the Laws of 1874, making, however, no substantial change in the methods of levying the tax, valuing the property and making collections.

In 1876, the legislature passed an act, which appears as Chapter 17 of the laws of that year, which, as to the amount of tax, after having enumerated in the previous section, the kinds of property exempt from taxation, merely provides that "all other property of whatsoever description, shall be assessed and taxed as now provided by law." The remainder of this act is devoted principally to details of how returns shall be made to the assessor and as to the duties of the assessor in making up his lists, but the first paragraph of section 6 is as follows:

> Sec. 6. The several assessors shall, whenever they shall change or increase the list returned by any person, or increase the amount of any assessment; give the person interested notice in writing of such change; by depositing in the postoffice addressed to such person at his or her usual place of residence or business, a written or printed notice of such change, immediately after changing the assessment. And shall immediately after the time fixed herein, within which returns may be made, deliver an alphabetical list of the names of each person liable to pay a tax, and the amount of tax for which such person may be liable, to the board of county supervisors, who shall examine, revise and correct the same, and endorse their order thereon to the proper collector for the collection thereof. Which order, shall have the same effect in all respects, as an execution against each person named in such list for the amount of tax due from

> such person. And if the board of supervisors shall increase the amount of any assessment, the clerk of the board shall give notice of such change to the person interested in the manner above provided.

Although mention is made in this section of "county supervisors," yet that must be taken as referring to the county commissioners, as there never have been any supervisors *eo nomine* in New Mexico, and the county commissioners came into existence under another act of the same session, approved one day earlier than the one from which the above quotation is made, and appearing as chapter 1 of the Laws of 1876. In section 14 of that act occur two clauses relating to taxes, and we quote as follows:

> Sec. 14. The board of county commissioners shall have power at any session.
>
> * * * * *
>
> Fourth, To apportion and order the collection of taxes by law.
>
> * * * * *
>
> Tenth, They shall also constitute boards of equalization of taxes and to hear appeals from the action of the assessors who make the assessments; they shall revise the lists of assessment within their respective counties, and shall correct the same, and shall hear and determine all appeals of assessments that may be brought before them, as required by law, and in no event shall the said commissioners levy any assessment of taxes exceeding one per cent.

It has been held that the apportionment of taxes consists in a selection of the subjects to be taxed and in laying down the rule by which to measure the contribution

which each of these subjects shall make to the tax, and that therefore it is a matter of legislation.

Barbehl v. Gleason, 111 Ky., 491.

It is obvious that the language of the paragraph above quoted, giving the county commissioners power to apportion taxes, cannot have this meaning. The legislature in New Mexico has never attempted to delegate this legislative function to the county commissioners, but has always declared what were the subjects of taxation, and, until a comparatively recent period, definitely fixed the rates, with the exception of what might be levied for the payment of judgments.

From the tenth subdivision as above quoted, it is clear that there was a legislative intent that the commissioners should levy taxes, but nowhere in that act nor in any other earlier or contemporaneous act, did the legislature commit anything of that kind to the discretion of the commissioners except in the section next quoted.

Section 7 of the same act is as follows:

> Sec. 7. When a judgment shall be rendered against any board of county commissioners of any county, or against any county officer in an action prosecuted by or against him in his name where the same shall be paid by the county, no execution shall issue upon said judgment, but the same shall be levied and paid by tax as other county charges, and when so collected shall be paid by the county treasurer to the person to whom the same shall be adjudged, upon the delivery of a proper voucher therefor.

The position of the court below appears to be that, practically, there is nothing to be found in later legislation in any way affecting or modifying these provisions

of the law of 1876; that the county commissioners by that act were authorized to levy all taxes, but were limited to a total of all levies for all purposes to one per cent., although the legislature had already made an absolute levy of one per cent., and that this one per cent. must include anything which might be levied for the payment of a judgment. While it seems that the commissioners were authorized by this act to make levies, it does not follow, it cannot follow, that the one per cent. levied by the legislature should include a levy made for the payment of judgments. No change was made by the legislature in the antecedent legislation which absolutely levied a tax of one percentum upon all property subject to taxation, of which one-half was to be applied to territorial purposes, one-fourth to county purposes and one-fourth to school purposes in the county. The legislature made this levy and the county commissioners had no control over it nor any discretion about it. The prohibition as to how much the commissioners should levy, must refer to something else, and it can refer to nothing except the levy authorized to pay judgments.

In 1882, section 6 of Chap. 62 reads as follows:

> Sec. 6. There shall be levied and assessed upon the taxable property within this territory in each year the following taxes:
>
> For territorial revenue, one-half of one cent.
>
> For ordinary county revenue, one-fourth of one per cent.
>
> For maintenance and support of public schools, one-fourth of one per cent.

It will be seen that this act of 1882, which is the last referred to in the opinion of the court below, and

upon which, curiously enough, that court seems to base its decision in great part, leaves the law just as it was before. The commissioners remained vested with some discretionary power to levy taxes up to one per cent., while the legislature, itself, makes this general levy of one per cent. for territorial, county and school purposes. The limitation on the power of the county commissioners to levy taxes clearly can have no reference to this general tax of one per cent. levied by the legislature with the levying of which the county commissioners have nothing to do beyond seeing that it is properly spread upon the tax rolls. Does it not, then, follow irresistibly that the limitation of one per cent. is as to the tax to be levied for the payment of judgments? The record does not disclose that the levies complained of for payment of judgments come up to this one per cent. thus limited. The levy for the payment of judgments in 1895 was three and a half mills, in 1896 four and a half mills, but it does not appear how much was the levy for judgments in 1897.

Printed Record, Page 43.

FOURTH.

No statutory limit as to rate of taxation is applicable to payment of compulsory obligations imposed by the legislature.

It will undoubtedly be conceded that the judgments, for the payment of which taxes were levied, were based upon what may be properly termed "compulsory obligations" imposed upon the county by the legislature. It would be a waste of time and space to attempt here to collect together all of the legislation to show

the correctness of this statement. The character of the indebtedness is sufficiently shown in the twenty-second subdivision of the agreed statements of facts, near the foot of page 45 of the printed record, and it must suffice here to assert that all of such expenses were incurred in pursuance of statutory direction and requirement, as to which the county had no power or discretion. This being so, the position of appellant is that any antecedent statutory limitation as to the power to tax, the observance of which would result in inability fully to discharge the duties imposed by later legislation, must be considered as abrogated by the same legislature which had created it.

The supreme court of New Mexico appears to rely upon the doctrine of the case of *Lake County v. Rollins*, 130 *U. S.*, 662, as sustaining its decision, but apparently no attention was given to the fact that that case turned upon the existence of a constitutional prohibition as to the creation of indebtedness, wherefore it was held, in effect, that the legislature could not, under the constitution, impose any compulsory obligation upon a county by which a valid indebtedness in excess of the constitutional limit would be created. In the present case, absolutely no question whatever in the nature of a constitutional limitation, is raised by the record, and it is obvious that a statutory limitation is of an entirely different character, and when the legislature forces upon counties the duty of providing for expenses which will create indebtedness in excess of a statutory limit, it must be held that the legislative intent is to disregard the limit which it had previously expressed. This is not unlike the doctrine as to the estoppel arising from

the recital in municipal bonds of full compliance with statutory requirements where no question of constitutional provisions comes in, even though the recitals may be untrue as matter of fact.

Hedges v. Dixon County, 150 *U. S.*, 187.
Dallas County v. McKenzie, 110 *U. S.*, 687.

The language of the learned judge who decided the Lake County case in the Circuit Court (34 *Fed. Rep.*, 850), is so clearly applicable to the present case that we cannot do better than to quote therefrom:

> The other class of debts springs from neither the voluntary nor the tortious acts of county officials. The county has neither voice nor opportunity in the matter. They are imposed by the legislature, and are generally such as affect the state at large as well as the county.
>
> It is well here to stop a moment, and consider what a county is. In one aspect, it is an independent corporation having peculiar private interests and concerns. The management of those interests and concerns is, as a general rule, confided to the county officials; and the debts incurred in the management of those private affairs are created by the voluntary contracts of these officials. In another aspect, the county is but a mere subdivision of the state, and only determines locally the administration of those affairs which affect the people of the state as a whole. Take the administration of justice in the courts, the matter of elections, the preservation of the public peace, and matters of a kindred nature. They are not purely private concerns of the county. They affect vitally and largely the interests of the state as a whole. It is common elsewhere, it was and is the case here, that the cost of these public services is cast largely upon the county. Not upon the county as an independent corporation, and solely interested in

and benefited by said services, but as a portion of the state, and as such portion thus contributing to the general welfare. In the creation of debt for these services the county is not consulted, It has no voice in saying when they shall be incurred or to what extent. I know the line of demarcation is not preserved with absolute uniformity, but the general character of the difference between contractual and compulsory obligations is as I have said. This is a matter of common knowledge, and must have been within the contemplation of the framers of the constitution. Was it their intent to relieve the county of liability for these "compulsory obligations" when in any manner the general limit of indebtedness had been reached? See what that would imply. The possibility that county commissioners by extravagance might largely impair, even practically defeat, the administration of justice, the preservation of peace, and even the holding of elections. For public service without expectation of any pay, is seldom done, or, if done, only poorly. Will a constable serve processes, will a sheriff, at personal risk, preserve the peace; will a county attorney prosecute with vigor and interest; will juror or witness attend, giving up private interests for public good—with the knowledge that these, their services, are gratuitous, and will receive no compensation?

We desire to invoke also as specially applicable, the doctrine established by this court, that the authorization of expenditures by municipal corporations implies and carries with it the pawer to raise money by taxation to meet such expenditures. The following quotation will sufficiently show this rule:

> . . The position that the power of taxation belongs exclusively to the legislative branch of the government, no one will controvert. Under our system it is lodged nowhere else. But it is a

power that may be delegated by the legislature to municipal corporations, which are merely instrumentalities of the state for the better administration of the government in matters of local concern. When such a corporation is created, the power of taxation is vested in it as an essential attribute, for all the purposes of its existence, unless its exercise be in express terms prohibited. For the accomplishment of those purposes, its authorities, however limited the corporation, must have the power to raise money and control its expenditure. In a city, even of small extent, they have to provide for the preservation of peace, good order and health, and the execution of such measures as conduce to the general good of its citizens; such as the opening and repairing of streets; the construction of sidewalks, sewers and drains; the introduction of water, and the establishment of a fire and police department. In a city like New Orleans, situated on a navigable stream, or on a harbor of a lake or sea, their powers are usually enlarged, so as to embrace the building of wharves and docks or levees for the benefit of commerce, and they may extend also to the construction of roads leading to it, or the contributing of aid towards their construction. The number and variety of works which may be authorized, having a general regard to the welfare of the city or of its people, are mere matters of legislative discretion. All of them require for their execution considerable expenditures of money. Their authorization without providing the means for such expenditures would be an idle and futile proceeding. Their authorization, therefore, implies and carries with it the power to adopt the ordinary means employed by such bodies to raise funds for their execution, unless such funds are otherwise provided. And the ordinary means in such cases is taxation. A municipality without the power of taxation would be a body without life, incapable

of acting, and serving no useful purpose.
United States v. New Orleans, 98 U. S., 392-3.

It is respectfully submitted that the judgment of the supreme court of New Mexico ought to be set aside, and this cause remanded to that court with directions to affirm the judgment of the district court of Grant County.

A. H. HARLLEE,
FRANK W. CLANCY,
Counsel for Appellant.

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Supreme Court of the United States

OCTOBER TERM, 1905.

No. 182.

TERRITORY OF NEW MEXICO, APPELLANT.

vs.

ATCHISON, TOPEKA & SANTA FE RAILROAD COMPANY, ET AL.

Additional Assignments of Error.

Now comes appellant, and specifies the following as additional assignments of error herein:

6. The Supreme Court of New Mexico erred in failing to hold that plaintiff and appellant was entitled to interest at the rate of twenty-five per centum per annum on its judgment from October 9, 1902.

7. The said Supreme Court erred in failing to hold that plaintiff was entitled to interest at the rate of twenty-five per centum per annum, upon so much of the judgment of the district court as was affirmed, from October 9, 1902.

Wherefore appellant prays that the judgment of said Supreme Court of New Mexico be reversed and this cause remanded to said Supreme Court with directions to affirm the judgment of the district court of Grant County with interest at the rate of twenty-five per cent per annum from October 9, 1902.

FRANK W. CLANCY,
Counsel for Appellant.

Brief on Additional Assignments of Error.

A similar point to the one thus raised, was presented to this court in a former case from New Mexico, and was decided against the Territory, ~~finally~~ purely upon equitable grounds which can have no application to the case now submitted.

The statute of the Territory on the subject is to be found in Section 4066, of the Compiled Laws of 1897, as follows:

> On the first day of January, in each year, half of the unpaid taxes for the year past, and on the first day of July in each year, the remaining half of the unpaid taxes for the year past, shall become delinquent, and shall draw interest at the rate of twenty-five per cent per annum, but the collector shall continue to receive payments of the same after the first day of January and July, until the day of the sale.

In the former case, above referred to, the Territory claimed interest from the date of delinquency. It was claimed that there had been later legislation in 1899, doing away with this

interest on taxes, even prior to 1899, but this court said that this might be doubtful, and held in substance, that the character of the assessment was such as to justify resistance, and that it would be inequitable to impose penalties for non-payment.

U. S. Trust Co. v. New Mexico, 183 *U. S.*, 544.

No such circumstances exist in the present case, and while the plaintiff might have been content with its judgment, as rendered in the district court if it could have had it three years ago, it is not now cut off from claiming this interest from the date of that judgment in October, 1902.

FRANK W. CLANCY,
Counsel for Appellant.